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Brexit, prerogative and the courts: why did political constitutionalists support the Government side in *Miller*?

Gavin Phillipson^{*}

I. INTRODUCTION

What makes the case of *Miller v Secretary of State for Exiting the European Union*¹ of interest in a volume dedicated to the rise of judicial power in the constitution? What makes it noteworthy as a point of contestation between legal and political constitutionalists? One might observe first that *Miller* was probably unique in British constitutional history in terms of the sheer scale of both academic and general public interest that it generated. Dubbed the ‘constitutional case of the century’, it received saturation, if sometimes sensationalist, coverage across the UK print and broadcast media and was widely reported around the world. Given that it concerned the issue of Brexit – the most explosively contentious as well as the most important issue in British politics – this was perhaps not surprising. More importantly for our purposes, it produced a volume and intensity of engagement by the academic community that was unprecedented. Several hundred thousand words of commentary about it were published in a few short months, on the UKCLA blog and elsewhere,² including notable contributions by scholars from Australia³ and New Zealand.⁴ It also provoked passionate disagreement. The public law community was split down the

^{*} Professor of Law, Durham University, UK. An earlier version of this paper was given at a seminar at City University on 1 November 2017. The author is grateful to John Stanton for arranging and chairing it and all the participants. Many thanks also to Robert Craig and Alison Young for very helpful comments on an earlier draft of this article and particularly to Graham Gee for his invaluable editorial input. The usual disclaimer applies. All posts cited on the UK Const L. Blog are available at <https://ukconstitutionallaw.org/>. All websites were last visited on 15 December 2017.

¹ *R (on the application of Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5; [2017] 2 W.L.R. 583 (hereafter ‘*Miller*’).

² See e.g. the list of contributions compiled by R. Craig, ‘Miller: An Index of Reports and Commentary’ available at <https://ukconstitutionallaw.org/2017/01/25/robert-craig-miller-an-index-of-reports-and-commentary/>

³ N. Aroney, ‘*R (Miller) v Secretary of State for Exiting the European Union*: Three Competing Syllogisms’ (2017) 80(4) MLR 685.

⁴ C. McLachlan, ‘The Foreign Affairs Treaty Prerogative and the Law of the Land’, U.K. Const. L. Blog (14th Nov 2016).

middle. Moreover, academic commentary, unusually, played a prominent part in providing legal arguments used in the case. In particular, when the Government's lawyers, following their comprehensive defeat in the Divisional Court, were forced to 'retool', they did so very largely by drawing on academic criticism of the Divisional Court decision.

Another notable feature of the case for our purposes is that Policy Exchange's Judicial Power Project⁵, which takes a highly sceptical stance on judicial power in the constitution, took a strongly pro-Government line throughout. This echoed the way that the public law community split on *Miller*. Broadly speaking, those seen as having a political constitutionalist bent – favouring political determinations of constitutional questions, and democratic power over judicial determination and judicial power – supported the Government side;⁶ legal constitutionalists the claimant side. There were of course exceptions: Mark Elliott, whom I would regard as a moderate legal constitutionalist, argued strongly for the Government side throughout.⁷ Conversely Keith Ewing, one of the most long-standing and doughty advocates of the political constitution, argued against use of the prerogative.⁸ But the general tendency was clear.

Why then the intense controversy? At a general level, the stakes were extraordinarily high, given that the case related to the intensely divisive issue of Brexit, and followed the shock result of a nationwide referendum, in which a slim but clear majority voted to leave the EU.⁹ More specifically, the case concerned a challenge to the Government's assertion that it intended to use the 'foreign affairs' prerogative to commence the formal process of withdrawal by triggering Article 50 of the Treaty of Lisbon. And it is here that we start to uncover the deeper sources of the legal controversy. Since the

⁵ See generally <https://judicialpowerproject.org.uk/>

⁶ I would include within this list Richard Ekins, John Finnis, Adam Tomkins, Sir Stephen Laws, Mikolaj Barczentewicz, Timothy Endicott, Christopher Forsyth and Mike Gordon, all of whose work is discussed and cited in this paper.

⁷ Though see e.g. his critical analysis of some of the initial Government arguments: <https://judicialpowerproject.org.uk/mark-elliott-the-governments-case-in-the-article-50-litigation-a-critique/>

⁸ See K. Ewing, 'Brexit and Parliamentary sovereignty' (2017) 80(4) MLR 711, 716. He was joined in this by Robert Craig: 'Casting Aside Clanking Medieval Chains: Prerogative, Statute and Article 50 after the EU Referendum' (2016) 79(6) MLR 1041; both considered that there was *already* a statutory power available to the Government via the reception into UK law of Article 50. This argument was not generally accepted; for a rebuttal, see below, note 19.

⁹ On 23 June 2016 the people of the UK and Gibraltar voted to leave the European Union by 51.89% cent to 48.11%.

early 17th century *Case of Proclamations*¹⁰ courts have asserted that they have the power to adjudicate upon whether a claimed prerogative power exists and to delineate its scope. This was followed by a line of cases governing clashes between prerogative and statute. One well known decision, *De Keyser's*,¹¹ determined that where Parliament legislates in an area previously occupied by the prerogative or abrogates it by specific statutory provision, the prerogative must give way and go into 'abeyance'. Another key principle, enunciated by the House of Lords in the *Rayner* case, is that:

the Royal Prerogative, whilst it embraces the making of treaties, does not extend to altering the law or conferring rights upon individuals or depriving individuals of rights which they enjoy in domestic law without the intervention of Parliament.¹²

This principle was said to be rooted in the declaration in Article 1 of the Bill of Rights 1689 that 'the pretended power of suspending of laws or the execution of laws by regal authority without consent of Parlyament is illegal'. On this basis it has been said judicially that 'since the 17th century the prerogative has not empowered the Crown to change English common law or statute law'.¹³ Finally, the decisions in *Fire Brigades Union*¹⁴ and *Laker Airways*¹⁵ were said to give rise to a more specific, albeit related, principle: that the prerogative may not be used to 'frustrate' the intention of Parliament as expressed in any statute (hereafter, 'the frustration principle').¹⁶

At first sight, it might not be immediately apparent why a case concerned with the above principles should divide opinion as between legal and political constitutionalists. For arguably these principles flow logically from one of the simplest aspects of the doctrine of parliamentary sovereignty: that Acts of Parliament, as the highest form of law, rank above inferior sources, including both prerogative and common law. Thus courts, in affirming them, may be seen not as advancing their own powers, but simply defending Parliament's.

¹⁰ (1610) 12 Co. Rep. 74; 77 E.R. 1352

¹¹ *Attorney General v De Keyser's Hotel* [1920] AC 508, 540 (HL).

¹² *JH Rayner (Mincing Lane Ltd) v DTI* [1990] 2 AC 418, 500.

¹³ *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2009] AC 453 at [44].

¹⁴ *R v Secretary of State for the Home Department, Ex p Fire Brigades Union* [1995] 2 AC 513.

¹⁵ *Laker Airways v Department of Trade* [1977] QB 643.

¹⁶ The distinction between abeyance and frustration is valuably analysed by R. Craig: 'Casting Aside Clanking Medieval Chains: Prerogative, Statute and Article 50 after the EU Referendum' (2016) 79(6) MLR 1041.

However, there were other aspects of *Miller* that pushed perceptions of it the opposite direction, making it appear a further stepping stone in the advance of judicial power. It did, after all, concern judicial review of the ‘foreign affairs’ prerogative, under which it is well-accepted that the Executive has power to enter into and withdraw from treaties. The starting point here is that ‘the conduct of foreign affairs, including the making of treaties is still considered to be beyond the reach of judicial review’.¹⁷ Hence *Miller* might appear to be part of ‘the drift towards ever more searching judicial review of ever more previously non-justiciable matters’,¹⁸ especially since it concerned the formal opening of negotiations between the British Government and an international organisation – the EU. Before *Miller* was decided, the fear was expressed that, were the courts to rule against the British Government in the case, this would risk not just its international embarrassment but also serious interference with ‘its ability to conduct...fruitful negotiations with foreign governments or international organisations’, specifically its freedom ‘to choose the moment that in its view was the most propitious one to start the exit process’.¹⁹ It was concerns like this that led to ‘widespread scepticism about whether the courts had the grounds to intervene, and if they did whether they would have the courage to do so’.²⁰

A further reason for caution was evident: as discussed below, in an area as intensely controversial as Brexit, and particularly after the decision to withdraw had been made via a nationwide referendum, any intrusion by the courts might be seen as treading on Parliament’s toes.²¹ As a sovereign legislature, Parliament could, at least in theory, impose whatever controls it wished upon the Executive’s ability to commence the exit process; and

¹⁷ *R (SG) v Secretary of State for Work and Pensions* [2015] UKSC 16, at [237] (per Lord Kerr). Since *CCSU v Minister for Civil Service* [1985] AC 374, courts have affirmed that, prima facie, the exercise of prerogative powers may be subject to review. However, this advance was ‘substantially hollowed out by the long list of prerogatives that were said to be non-justiciable’, including the making of treaties, prerogative of mercy and defence of the realm, although subsequent case-law made some modest inroads into those ‘forbidden areas’: M. Elliott, ‘Judicial Power and the United Kingdom’s Changing Constitution’ in this volume [ADD DETAILS AT PROOF STAGE]

¹⁸ R. Ekins, ‘The Dynamics of Judicial Power in the New British Constitution’, 1 February 2017, at 17; available <http://judicialpowerproject.org.uk/wp-content/uploads/2017/02/Ekins-text-final.pdf>

¹⁹ G. Phillipson, ‘A Dive into Deep Constitutional Waters: Article 50, the Prerogative and Parliament’, [2016] MLR 70(6) 1064, 1079. Subsequent events proved these fears largely groundless.

²⁰ KD Ewing, ‘Editor’s Introduction’ (2016) 27(3) *King’s Law Journal*, 289.

²¹ In *R v Her Majesty’s Treasury, ex p Smedley* [1985] QB 657, 666, Sir John Donaldson remarked that ‘It behoves the courts to be ever sensitive to the paramount need to refrain from trespassing upon the province of Parliament or, so far as this can be avoided, even appearing to do so’.

as a democratic legislature, it would naturally wish to respect the wishes of the people expressed in a referendum it itself had authorised. It was likely a combination of some or all of these considerations that led most political constitutionalists to rally to the banner of the prerogative and support the Government side.

On the other hand, the case did *not* appear to concern what is perhaps the core concern of political constitutionalists: policy decisions being taken out of the hands of democratic decision-makers and placed in the hands of judges.²² The court was only being asked, in a sense, to choose *between* the two democratic branches of government. Moreover, as is well known, at least one leading political constitutionalist – Adam Tomkins – has expressed active hostility towards the whole notion of prerogative powers. For the prerogative is, of course, a residue of royal power. Hence the prerogative powers have never been granted by any deliberate or democratic decision to the Executive. Instead they have been, in effect, inherited by Ministers from the residual powers of an unelected hereditary Monarch. Tomkins has argued that, ‘Government should possess only those powers which the people, through their elected representatives in Parliament have...conferred on it by statute’²³ and proposed therefore that prerogative powers should be abolished wholesale and replaced by modern statutory powers, whose extent and limits would be determined by Parliament. This then was one reason why the strong support of most political constitutionalists for the Government side might appear something of a puzzle.

Moreover, supporting the Government side meant *prima facie* supporting the notion that the Prime Minister, exercising her prerogative powers, could set in train a series of events that would cause a huge corpus of law—including a very substantial body of rights enjoyed and enforceable in UK domestic law, covering employment law, equal pay, environmental law, discrimination law and so on—to simply evaporate.²⁴ And such an outcome *seems* contrary to the well established principle set out above that the prerogative

²² N. Aroney and B. Saunders, ‘On Judicial Rascals and Self-Appointed Monarchs: The Rise of Judicial Power in Australia’ at 000. [INSERT DETAILS AT PROOF STAGE].

²³ *Our Republican Constitution* (Hart, 2005) p.132.

²⁴ This was because, under Article 50(3) the EU Treaties would cease to apply to the UK two years after Article 50 was triggered (unless the period was extended by unanimous agreement of all 28 member states) and with them, the whole corpus of EU law.

does not extend to changing domestic law or removing rights enjoyed in domestic law. Moreover, while the defence of a strong and effective Executive branch may be seen as an aspect of political constitutionalism,²⁵ it does not follow that executive power should be elevated over the rights of the individual given effect by statute.

This then is the concern of this article: to explore what could account for this enthusiastic support by political constitutionalists for an outcome that, on the face of it, appeared to favour the royal prerogative over rights given effect by parliamentary statute. Its purpose therefore is *not* to analyse the detailed doctrinal controversies around *Miller* – something I have done elsewhere.²⁶ Rather it is to consider some of the possible reasons *why* political constitutionalists were drawn to defend use of the prerogative in this case.

The article proceeds in four main steps. It first considers a preliminary objection to the claimant's case - one that suggested this was all a fuss about nothing, given Parliament's likely *future* role in legislating for Brexit. It then considers what it characterises as two broad-brush arguments favouring the Government side: the importance of the referendum result and Parliament's ability itself to control the Executive without judicial assistance. It argues that, while certainly *evoking* values of democracy and political accountability that are core to political constitutionalism, both ultimately fail to establish their relevance to the specific issue disputed in *Miller*. The article proffers instead an alternative means for the significance of the referendum to be constitutionally recognised. It then moves on to consider the two key legal arguments of the Government: those based on the *De Keyser's* principle and the alleged *conditionality* of EU law rights in domestic law. It does so through the same lens of legal-political constitutionalism. Finally, it considers through the same lens a specific issue in relation to which *Miller* may be argued to have changed our understanding of the constitution – the notion of 'constitutional statutes', commonly understood to be immune from implied repeal.

²⁵ Timothy Endicott's energetic and scholarly defence of the legitimacy of prerogative powers ('The Stubborn Stain Theory of Executive Power' (Policy Exchange, 2016)) to my mind amounts to a defence of *executive* powers, in general, rather than specifically *prerogative* powers.

²⁶ See G. Phillipson, 'EU Law as an Agent of National Constitutional Change: *Miller v Secretary of State for Exiting the European Union*' [2017] *Yearbook of European Law* 1-48.

II. ANTICIPATING OR IGNORING PARLIAMENT'S FUTURE ROLE IN BREXIT?

We noted above that the core claimant argument in *Miller*: that the inevitable result of triggering Article 50 would be that a whole set of citizens' EU-law rights would disappear into thin air. One obvious reply to this concern is that this characterisation ignored the obvious fact that Parliament was always going to be involved in the process of Brexit. It would, at some point in the process, legislate both to repeal the European Communities Act 1972 ('ECA'), which gives effect to EU law in the UK, and to retain many of those rights. That indeed is what is happening now with the immensely complex European Union (Withdrawal) Bill 2017-2019, before Parliament at the time of writing. Once passed, this legislation will repeal the ECA and incorporate nearly all existing applicable EU law into UK law. Assuming this happens before the UK actually leaves the EU, at first sight, it would provide an answer both to the argument that the purpose of the ECA will be frustrated by withdrawal *and* that our EU-law rights will disappear wholesale.²⁷ As Adam Tomkins put it:

'triggering Article 50 will not dilute or diminish anyone's statutory rights...What happens to [our EU law] rights and obligations...will be a matter for Parliament to determine in due course.'²⁸

This was the argument that became known as 'sequencing' when run by the Government in the Divisional Court. But there are two main responses to it. First there is a category of rights that will *inevitably* be lost by exit,²⁹ whatever form it takes. These include notably the right to stand and vote in elections to the European Parliament.³⁰ But second, even in relation to the rights that Parliament was always likely to legislate to retain, the

²⁷ See e.g. Phillipson, note 19 above, at 1085; M. Gordon, 'The UK's Sovereignty Situation: Brexit, Bewilderment and Beyond' (2016) 27(3) *King's Law Journal*, 333, 339.

²⁸ A. Tomkins, 'Brexit, Democracy and the Rule of Law' (5 November 2016) available at <https://notesfromnorthbritain.wordpress.com/2016/11/05/brexit-democracy-and-the-rule-of-law/>

²⁹ The first category was those rights that would be lost but which could be converted into purely domestic law rights; the second was those that could only be replaced with the agreement of other states – e.g. free movement rights. The loss of EU-law rights is explicitly conceded by the Government's case on appeal: *R (on the application of Miller) v Secretary of State for Exiting the European Union* UKSC 2016/196: Printed Case of the Appellant, at 62[a].

³⁰ Guaranteed under the European Parliamentary Elections Act 2002.

Government rightly lost the ‘sequencing’ argument in the Divisional Court. For it was met with the simple but devastating rejoinder that the Government cannot defend a course of action that would be unlawful as things stand with the plea that Parliament will later enact legislation that will cure or avoid the illegality.³¹ Indeed the problem with the ‘sequencing’ argument is illustrated by considering Lord Carnwath’s rather tentative invocation of it in his dissent. Noting the Secretary of State’s assurance that there would be legislation to ‘reproduce existing European-based rights in domestic law’³² he said that ‘*on the assumption* that such a Bill becomes law by the time of withdrawal’, there would be no breach of the rule that actions taken under the prerogative may not alter domestic law. He then concedes that ‘of course that result depends on the will of Parliament: it is not in the gift of the executive’ – which might be thought fatal to the argument he has just made. Yet he adds ‘there is no basis for making the opposite assumption’³³ (that is, the Parliament will *not* pass the relevant legislation). But, with respect, a court cannot make *any* assumption about what Parliament *will* do, based on representations by the Government.³⁴ In the *Fire Brigades Union* case, the contention that the legislative scheme frustrated by a contrary use of the prerogative would be repealed at some later date was rightly rejected as irrelevant by the House of Lords.³⁵ A court quite simply should not even enter into the enquiry about whether Parliament will, or will not, act in future. As the majority put it: ‘That is a matter for Parliament to decide in due course’. The court’s role is simple: to resolve the matter ‘in accordance with the law as it stands’.³⁶ Were it otherwise, a court could *always* be

³¹ As the majority put it in the Supreme Court, while ‘it is intended’ that ‘the Great Repeal Bill’ will repeal the ECA 1972 and ‘convert existing EU law into domestic law’, ‘ministers’ intentions are not law, and the courts cannot proceed on the assumption that they will necessarily become law’. (*Miller* at [34] and [35]).

³² *Ibid* at [262].

³³ *Ibid* at [264].

³⁴ I am referring to the situation in which a court is considering the *lawfulness* of proposed Executive action; the position may be different where a court is considering merely what remedy to award. E.g. in *Bellinger v Bellinger* [2003] 2 AC 467 (HL) the court considered that the likelihood of Parliament remedying the incompatibility legislatively was a reason for issuing a declaration of incompatibility under s 4 of the Human Rights Act, rather than re-interpreting the incompatible legislation under s 3.

³⁵ Per Lord Browne-Wilkinson in *R v Secretary of State for the Home Department, Ex p Fire Brigades Union* [1995] 2 AC 513, 552.

³⁶ *Miller* at [34] and [35].

dissuaded from a finding of *ultra vires* by the argument that Parliament would doubtless legislate in future to supply the legal basis currently lacking.³⁷

This leaves us with four main arguments on the Government side. Two I characterise as broad-brush constitutional arguments, based on democratic reasoning, which might be thought to hold an obvious *prima facie* appeal to political constitutionalists; two are tightly legal-doctrinal.

III. TWO BROAD-BRUSH DEMOCRATIC ARGUMENTS

A. *The constitutional significance of the referendum*

The first argument concerns the constitutional, and potentially the *legal*, significance of the EU referendum. Many commentators, including myself,³⁸ thought that the referendum result *must* make some kind of difference to the permissibility of using the prerogative to trigger Article 50. The argument was that in the classic cases concerning clashes of prerogative and statute - *Fire Brigades Union*, *Laker Airways*³⁹ and *De Keyser's* - the Executive was using its prerogative powers simply to further its own policies, and in doing so overriding or evading the will of Parliament as expressed in legislation. But that was not the case here. The Government was giving effect to the result of a huge democratic exercise: the 2016 referendum. Moreover, the legal basis for the referendum had been provided in legislation recently passed by Parliament itself.⁴⁰

Commentary on *Miller* gives the impression that many contributors to the debate felt that the referendum should therefore have a bearing on the outcome,⁴¹ but that they often struggled to articulate exactly how it should figure as a *legal* argument. This was

³⁷ The majority quoted and applied dicta from Lord Browne-Wilkinson in the *Fire Brigades Union* case that, 'it was inappropriate for ministers to base their actions (or to invite the court to make any decision) on the basis of an anticipated repeal of a statutory provision as that would involve ministers (or the court) pre-empting Parliament's decision whether to enact that repeal.' (Miller at [51]).

³⁸ Phillipson, note 19 above, at 1087.

³⁹ *Laker Airways v Department of Trade* [1977] QB 643.

⁴⁰ European Union Referendum Act 2015.

⁴¹ See R. Ekins, 'Constitutional practice and principle in the article 50 litigation' (2007) 133(Jul) LQR 347, 348.

reflected in the way that Government counsel when arguing the case constantly referred to the referendum result – but appeared unclear as to its precise legal relevance.⁴² One commentator suggested that it figure as a broader constitutional argument, but not a strictly legal one.⁴³ Mark Elliott argued that:

A bald, prerogative-based constitutional power grab by the executive at the expense of Parliament is one thing. But the constitutional offensiveness of using prerogative power in the circumstances with which *Miller* was concerned cannot sensibly be evaluated without reference to the fact that such power would have been being deployed so as to implement the outcome of a referendum ...which, in the first place, had been provided for by Parliament through primary legislation.⁴⁴

But Elliott does not go on to explain exactly how the referendum could figure in the legal evaluation of the case; and in fact his (and Richard Ekins's) key arguments for the Government side do not depend at all on the referendum and would apply regardless of it.⁴⁵ Adam Tomkins similarly criticises the Divisional Court's failure to grapple with the referendum result as 'a stark omission',⁴⁶ but again makes no attempt to suggest what its precise legal relevance could be. Only Forsyth made the tentative suggestion that 2015 Act authorising the referendum could be seen as Parliament having 'impliedly delegated the power' to make the withdrawal decision to the people. But he admitted that it would '[i]t would require a bold judge to adopt',⁴⁷ such a reading of the Act, given its complete silence

⁴² In the Supreme Court, the majority noted that, 'in answer to a question from the Court, [lead counsel for the Government] adopted a suggestion that, even if Parliamentary authority would otherwise have been required, the 2015 Act and the subsequent referendum dispensed with that requirement, *but he did not develop that argument*, in our view realistically' (*Miller* at [38], emphasis added).

⁴³ M. Barcentewicz, 'What is the Government Really Arguing in the Article 50 Litigation?: A Response to Mark Elliott', *Policy Exchange's Judicial Power Project* (5th October 2016). <https://judicialpowerproject.org.uk/mikolaj-barcentewicz-what-is-the-government-really-arguing-in-the-article-50-litigation-a-response-to-mark-elliott/>

⁴⁴ M. Elliott, 'The Supreme Court's Judgment in *Miller*: In Search of Constitutional Principle' (2017) 76(2) CLJ 257, 282.

⁴⁵ As discussed below at 000-000.

⁴⁶ <https://notesfromnorthbritain.wordpress.com/2016/11/05/brexit-democracy-and-the-rule-of-law/>

⁴⁷ C. Forsyth, 'The High Court's *Miller* Judgment', *Policy Exchange's Judicial Power Project* (8 November 2016). <https://judicialpowerproject.org.uk/christopher-forsyth-the-high-courts-miller-judgment/>. Gordon, note 27 above, at 338 also refers to Parliament having 'passed power to the

on the legal consequences of a vote either way. The general political constitutionalist objection to such ‘bold readings’ of legislation by activist judges⁴⁸ – which Forsyth strongly shares – perhaps explains the rather tentative nature of this suggestion.

Overall, while it was generally agreed that the referendum result could not be treated as legally *binding*, given the failure of the 2015 Act to prescribe any consequences of the outcome of the vote, there appeared to be some unease with the idea of the court in *Miller* finding the result to be wholly *irrelevant*. And indeed the rather cursory treatment of the referendum by the Divisional Court⁴⁹ put an unfortunate complexion on that Court’s quotation of Dicey that ‘the judges know nothing of any “will of the people”’⁵⁰ it almost gave the impression that the judges were wilfully *ignoring* the referendum. Surely the fact that the result was not made *binding* did not mean that it should be treated as legally *irrelevant*?

B. The second broad-brush argument: Parliament does not need the courts’ intervention

This second argument characterises *Miller* as being about whether Parliament should be *consulted* or have ‘a say over’ whether and when Article 50 is triggered – and then robustly responds that Parliament can have whatever role it wants in relation to this decision, without assistance from the courts. As Lord Reed put it in the Supreme Court, ‘it is for Parliament, not the courts, to determine the nature and extent of its involvement’.⁵¹ Unlike the referendum argument, this *did* figure strongly in the dissenting judgments in *Miller* – and indeed Paul Daly has described the division of opinion on this argument as a ‘fault-line’⁵² between reliance on ‘political accountability’ (emphasised by the dissenters,

electorate to decide whether to remain or leave the EU’, but I assume this refers to political, rather than legal power.

⁴⁸ See e.g. the highly critical commentary by Forsyth (with Ekins) on the bold ‘reading-down’ of the statutory ministerial veto in *R (Evans) v Attorney General* [2015] UKSC 21; R. Ekins and C. Forsyth, *Judging the Public Interest: The Rule of Law vs the Rule of Judges* (Policy Exchange, 2015).

⁴⁹ In which it merely noted, in three short paragraphs that it was ‘advisory’: *R (Miller) v Secretary of State for Exiting the European Union* [2016] EWHC 2768, [2017] 1 All E.R. 158.

⁵⁰ The quote of course concludes with ‘....except as expressed in legislation’: *ibid*, at [22].

⁵¹ *Miller* at [262].

⁵² P. Daly, ‘Brexit: Legal and Political Fault Lines’ *Public Law* 2017, Nov Supp (Brexit Special Extra Issue 2017), 73.

especially Lord Reed and Lord Carnwarth) and the ‘legal accountability’ (emphasised by the majority). This division is of course also one common way of expressing the difference between legal and political constitutionalism.

Arguments in favour of relying on political accountability in *Miller* were advanced by several authors. I suggested that while ‘the Government should not take a step as momentous as triggering Art 50 without in some way seeking the approval and consent of the Commons’, this was ‘a general principle of constitutional morality, the operation of which should be worked out between the two democratic branches’;⁵³ there was no need for the courts to intervene. Timothy Endicott similarly noted that, ‘Parliament has [a]...central role in...Brexit, and it was already carrying it out...through debate and scrutiny in both Houses...and the confidence of the Commons in Theresa May’s Government.’⁵⁴ Mike Gordon notes that ‘Parliament has been heavily involved’ in the decision on Brexit, ‘most significantly’ by enacting the 2015 Referendum Act’ and concludes that, while ‘[i]t is absolutely right—indeed, vital—that Parliament should debate and scrutinise the government’s plans for the withdrawal negotiations’, that role did not require legislation.⁵⁵ Similarly Lord Reed, in dissent, noted that ‘there has been considerable Parliamentary scrutiny’ of the issue including, in particular, the motion of 7 December 2016, in which the Commons expressly ‘call[ed] on the Government to invoke Article 50 by 31 March 2017’.⁵⁶ In other words, if *Miller* was about whether Parliament should ‘approve’ the triggering of Article 50, then two arguments would appear to follow: first *how* it did so was a matter for Parliament, not the courts; second Parliament had already *expressly approved* the invoking of Article 50, at least by the time the Supreme Court was hearing the case, in December 2016.

It is Lord Carnwarth’s dissent which makes the most of this argument, by drawing a parallel with the *Fire Brigades Union* case (‘*FBU*’).⁵⁷ In *FBU*, the House of Lords held 3-2 that use of the prerogative to introduce a new scheme for criminal injuries compensation was

⁵³ Phillipson, note 19 above, at 1079.

⁵⁴ Endicott, note 25 above, at 23.

⁵⁵ Gordon, note 27 above, 338, 339.

⁵⁶ *Miller* at [162]

⁵⁷ *R v Secretary of State for the Home Department Ex p Fire Brigades Union* [1995] 2 AC 513, 567, per Lord Mustill.

unlawful because it frustrated the intention of Parliament that the Minister decide *when* (but not *whether*) to introduce an inconsistent legislative scheme that had been passed but not yet brought into force. The dissenters in that case regarded the decision as ‘a most improper intrusion into a field which lies peculiarly within the province of Parliament’,⁵⁸ a criticism which Tomkins vigorously endorsed, portraying the decision as turning on a stark choice between legal and political forms of accountability and thus rival versions of constitutionalism.⁵⁹ Lord Carnwarth analyses *Miller* as likewise inviting the courts to intervene unnecessarily in the relationship between Parliament and Government, and on a hugely controversial political issue. And, like several academic commentators, he refers to the fact of Parliament having legislated for the referendum itself in order to refute the notion that the Executive was ‘foisting on Parliament’ the irreversible triggering of Article 50.⁶⁰ Noting in particular the December 2016 motion, in which the Commons expressly called for the triggering of Art 50, he concludes that ‘the formality of legislation is unnecessary to enable Parliament to fulfil its ordinary responsibility for scrutinising the government.’⁶¹

Seen in this way, *Miller* would be just another example of what Ekins critically notes as one ‘rationalisation’ for the expansion of judicial review, namely that ‘Executive domination of Parliament warranted a more assertive and intrusive role on the part of courts’.⁶² In other words, *Miller* could be seen as the courts rushing in to tame a Brexit-hungry Government because they did not *trust* Parliament to do the job properly – a picture of the case that would certainly rally political constitutionalists against it. One commentator indeed went so far as to suggest that the case entailed ‘questioning Parliament’s capacity or willingness’ to perform its ordinary functions and the court ‘telling Parliament how they should be done’, something that would be contrary to the fundamental constitutional principle of Parliament’s exclusive cognisance over its own proceedings.⁶³

⁵⁸ Lord Keith, *ibid* at 544, quoted by Lord Carnwarth in *Miller*, at [250].

⁵⁹ A. Tomkins *Public Law* (Oxford: Clarendon, 2003) 28-30.

⁶⁰ *Miller*, at [272].

⁶¹ *Miller*, at [255].

⁶² Ekins, note 18 above, at 3.

⁶³ As set out in Article 9 of the Bill of Rights 1689 (Sir Stephen Laws, ‘Questioning Parliament in the Courts?’, Policy Exchange’s Judicial Power Project (25 January 2017) available at <http://judicialpowerproject.org.uk/sir-stephen-laws-questioning-parliament-in-the-courts/>). This is a

My view now is that all the above arguments miss something fundamental about the case. They rely, consciously or unconsciously, on a mischaracterisation of what *Miller* was actually about.

C. *The answer to both broad-brush arguments: Miller was a vires case*

Discussions of *Miller*⁶⁴ and in particular much media reporting during, before and after the case⁶⁵ often misrepresented it, presenting it as being variously about whether the Government had to ‘consult’ MPs about the triggering of Article 50, or ‘seek Parliament’s approval’ for doing so. Such descriptions obscure the most fundamental and vital fact about *Miller*: that it was, at its simplest, a question of *vires* – of whether the Executive had the *legal power* to initiate withdrawal from the EU, given the claimed dramatic effect this would have on domestic law. I now think that it is impossible to get a clear picture of what was at stake in this case without understanding this fundamental point. Thus the claimants were not arguing that Parliament should ‘approve’ or ‘be consulted’ about the triggering of Article 50: neither such contention would be any business of the judges. They were arguing that the Government *lacked legal power* under the prerogative to commence withdrawal from the EU. If they were right about that, then the only way for the Government to obtain that legal power was through fresh primary legislation. Thus the legal question in *Miller* was one of the most basic the courts must decide in any state in which government, like the people, is subject to the rule of law: does the government have the legal power to do the act it proposes to do?

What is the significance of this for the arguments considered so far? It shows, first, that even under the most minimalist account of the rule of law, the question in *Miller* was properly one for judicial determination.⁶⁶ This was no case of judicial adventurism. It did not

fundamental mischaracterisation of *Miller*: the judgments did not ‘tell Parliament’ to do anything: they merely found the Executive currently lacked legal power to trigger Article 50. If every finding of *ultra vires* were to be interpreted as ‘telling Parliament to pass legislation’ to provide the legal basis found lacking, and hence as breaching Article 9, then the courts would be barred from enforcing even the most minimal version of the rule of law.

⁶⁴ E.g. Ewing at one point summarises *Miller* as laying down a ‘requirement that there should be parliamentary approval to trigger Article 50’ (Ewing, note 8 above, at 712). The rest of the article makes clear that the issue was legal basis not approval.

⁶⁵ See e.g. <https://blogs.spectator.co.uk/2017/11/since-article-50-was-triggered-a-no-deal-brex-it-has-been-the-default/> 12 Nov 2017.

⁶⁶ As nearly all critics of the case agreed: see e.g. Tomkins, note 28 above.

concern judicial review of the manner of *exercise* of the prerogative power but only of the 'logically prior' question of its *extent*.⁶⁷ whether its scope included the triggering of Article 50, given the well-established principle that the prerogative could not be used to alter domestic law or remove rights enjoyed in domestic law.

While this basic point about *Miller* is of course generally understood, its significance for the two 'broad-brush' arguments has not always been fully recognised. For if *ultra vires* is used as the lens through which to view the case then a key conclusion comes sharply into focus: neither of the two broad-brush arguments can go to the *specific legal issue* it raised. If the issue is whether the Government has the legal *power* to trigger Article 50, then the fact that Parliament can question, scrutinise, or even take control of the process becomes simply irrelevant. One cannot excuse an action contrary to law – an act that lacks a legal basis – by arguing that Ministers will be accountable to Parliament for it. Acceptance of such a view would drive a coach and horses not only through the *ultra vires* principle, but also the deeper constitutional principle it instantiates: the rule of law. Thus the case concerned not the necessity for obtaining Parliament's *approval* for the government policy of leaving the EU – something which is indeed merely a 'a general principle of constitutional morality'⁶⁸ – but the need for *legislation*, to render lawful what would otherwise be unlawful. This also reveals that the cautionary judicial adjuration cited by Lord Carnwarth – that parliamentary scrutiny, not judicial review, is the best way of ensuring that 'the executive...performs in a way which Parliament finds appropriate', because 'it is the task of Parliament and the executive... not of the courts, to govern the country'⁶⁹ – was in fact irrelevant. The issue was not whether the executive was 'performing appropriately', but whether it was proposing to act *unlawfully*; meanwhile the courts were being asked not to help 'govern the country' but to perform the quintessentially judicial task of elucidating the necessary legal basis for a crucially important action the Executive proposed to take.

The same reasoning also makes clear that the referendum result cannot go to the key legal issue in the case. The majority in *Miller* says simply:

⁶⁷ *Bancoult (No.2)* [2008] UKHL 61; [2009] 1 A.C. 453 at [143].

⁶⁸ Phillipson, note 19 above, at 1079.

⁶⁹ Per Lord Mustill in *Fire Brigades Union* (at 567) cited by Lord Carnwarth, *Miller* at [252].

‘Where, as in this case, implementation of a referendum result requires a change in the law of the land, and statute has not provided for that change, the change in the law must be made in the only way in which the UK constitution permits, namely through Parliamentary legislation.’⁷⁰

Similarly, Lord Hughes in dissent notes briefly that ‘[n]o-one suggests that the referendum by itself has the legal effect that a Government notice to leave the EU is made lawful’.⁷¹

One early suggestion made was that the democratic mandate given by the referendum to the Executive meant that ‘the normative concern typically generated by the Executive’s use of prerogative powers’ to override, frustrate or evade Parliament’s intention as expressed in legislation was arguably ‘absent in this particular case’. And that the courts could therefore perhaps conclude that the normal prohibition against such use of the prerogative was ‘not applicable on this novel set of facts’.⁷² However I now regard this suggestion as one that, like others, failed fully to appreciate that the issue here was *lack of power*. Once this is understood, it becomes plain that the referendum result *couldn’t* go to whether the Government possessed the legal *power* to commence withdrawal. If the prerogative is unavailable because it would remove legal rights or change domestic law then, quite simply, there is no power. The Government cannot magic a power out of thin air by saying, in effect: ‘Ah, but there was a referendum.’

Moreover, one can accept this conclusion without consigning the referendum result to legal *irrelevance*. While it cannot properly go to the existence of a *power* to withdraw from the EU, it could – at least in theory – go to a challenge to the *exercise* of that power.⁷³ The majority described as ‘a bold suggestion’ the notion that the *exercise* – as opposed to the applicability – of the treaty prerogative could be reviewable,⁷⁴ but it is possible to imagine extreme examples in which a court might contemplate it. For example, imagine that the ‘Remain’ side had won the referendum but the Government had decided to withdraw the UK from the EU anyway. It is at least possible that, in those extreme circumstances, an

⁷⁰ *Miller*, at [121].

⁷¹ *Ibid*, at [275].

⁷² See also ‘D.R. Wingfield, ‘The Brexit case: does the Constitution Have a Place for Democracy?’ (2016) 35(2) *Queensland LR* 343, 348.

⁷³ See Daly, note 52 above, at 84

⁷⁴ *Miller* at [92].

action based either on *Wednesbury* or even, conceivably, frustration of substantive legitimate expectations (generated by the promise to implement the referendum result) might have succeeded. This provides at least a possible path away from the complete legal irrelevance of the referendum. But while it points to a *possible* legal role for the plebiscite, it is only a tentative and speculative one; and, importantly also, not one that could have applied in *Miller* itself. A more substantive answer seems called for.

D. *Affording the referendum constitutional significance: a new convention?*

While the idea that an event of such immense importance as the EU referendum could be treated as devoid of legal significance is troubling, more worrying still is the notion that *Miller* – and the vitriolic reaction to it in some quarters – revealed a dangerous gap to have opened up between the *legal* view of the referendum and the *popular* (or political view) of it. Not only did the courts find that the referendum was not relevant to the narrow issue they had to decide, it was also frequently described by lawyerly Remainers as ‘only advisory’ – a description which, taken literally, seemed to conceive of the referendum purely as a form of ‘advice’ to those who would take the *real* decision – the politicians.

The trouble is that this was emphatically *not* the popular or general perception of the referendum. As many have pointed out, the Government sent a leaflet, paid for by public funds, to every house in the country, which said:

‘The referendum on Thursday, 23rd June is your chance to decide if we should remain in or leave the European Union. ‘This is your decision. The Government will implement what you decide.’⁷⁵

The echoed what the then Foreign Secretary had said, when introducing the Referendum Bill into Parliament: ‘the decision about our [EU] membership should be taken by the British people, not by...Government Ministers or parliamentarians.’⁷⁶ Thus *no-one* during the referendum campaign was saying that the whole exercise was really just a giant opinion poll

⁷⁵Available:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/517014/EU_referendum_leaflet_large_print.pdf

⁷⁶ See <https://www.gov.uk/government/speeches/a-simple-but-vital-piece-of-legislation-to-deliver-on-our-promise-to-give-the-british-people-the-final-say-on-our-eu-membership>.

- there to give politicians an idea of public opinion on the matter; but only in order to help *them* decide whether to Leave or Remain.

Thus my contention is that *Miller* and some of the furious reaction to it revealed that a dangerous gap had opened up between the *popular* perception of who was deciding the issue of withdrawal (the people, through the referendum) and the elite, 'insider', legal view (that the real decision remained one for the institutions of government: either Parliament or the Executive). The gap was between the legal reality and the political reality. And it may have been partly that gap that fuelled the extraordinary explosion of rage that greeted the first *Miller* decision,⁷⁷ including repeated accusations by senior Conservative and UKIP politicians and large sections of the press that the judges were trying to block Brexit⁷⁸ and extraordinary levels of public opprobrium being heaped on Gina Miller, including numerous threats of serious violence.⁷⁹

As noted above, one possible response to this intuition of a dangerous gap is to argue that it could be closed with legal doctrine. However as discussed above, it is very hard to see how the particular legal dispute in *Miller* could satisfactorily accommodate the referendum result as a matter of doctrine: and, as we saw above, while many argued for the relevance of the referendum to the case, there was very little by way of concrete doctrinal suggestion as to what exactly such an argument would be. So the question then becomes, as Wingfield has put, 'how the results of referendums can be afforded 'constitutional significance' even if they cannot be given strictly legal significance.⁸⁰ At this point one might ask: what is the usual way in which the UK constitution resolves gaps between legal doctrine and political reality? How does it afford constitutional significance to values that the law cannot enforce?

The answer of course is: through constitutional conventions. As many commentators have pointed out, one of the key functions of conventions is precisely 'to bridge gaps

⁷⁷ See also Emerton and Crawford: 'Parliament, the People and Interpreting the Law: *R (Miller) v Secretary of State for Exiting the European Union*' (2016) *Queensland LR* 35(2) 331,340.

⁷⁸ A summary and critique of the press and political reaction may be found at <https://theconversation.com/enemies-of-the-people-mps-and-press-gang-up-on-the-constitution-over-high-court-brexite-ruling-68241>

⁷⁹ See e.g. <https://www.theguardian.com/politics/2017/aug/09/gina-miller-afraid-to-leave-her-home-after-threats-of-acid-attacks>

⁸⁰ Above, note 72 at 347.

between legal positions that may be no longer normatively acceptable and a compelling political reality'.⁸¹ Aileen McHarg has referred to this as the functions conventions have in softening the impact of hard-law norms, making them acceptable in a contemporary context through governing the manner of its exercise.⁸² As she points out, this softening function of conventions has long applied to the exercise of legislative power by Parliament itself. Thus it is by a long-standing convention that the legally unlimited power of the Westminster Parliament to legislate for the self-governing overseas Dominions and territories was restrained so that such legislation was not imposed unasked for.⁸³ More recently, the Sewel Convention squared the legal reality of the unlimited sovereignty of the Westminster Parliament with the political imperative to grant Scotland a real and strong measure of devolution whereby Scotland controls her own affairs in the areas devolved without interference from Westminster.⁸⁴ Thus as Mike Gordon reminds us:

the entire justification for the doctrine of parliamentary sovereignty, and the legally unlimited legislative power which it allocates to the UK Parliament, is premised on the fact that this power is constitutionally limited, just not by law.⁸⁵

This paper therefore contends that if the UK is to continue using referendums – which seems likely⁸⁶ – it is time to consider whether a convention should now be recognised to the effect that parliament and government will abide by the results of referendums.⁸⁷ Detailed consideration of the case for such a convention, both normative and analytical, must await another day. For now it will suffice to briefly consider whether the famous 'Jennings test' for the existence of conventions might be satisfied. That test, it will be

⁸¹ See e.g. Elliott and Thomas, *Public Law* (2016, 3rd ed) at 62. An obvious example is the convention whereby the Queen's prerogative powers are exercised on her behalf by Ministers.

⁸² A. McHarg, 'Reforming the United Kingdom Constitution: Law, Convention, Soft Law' (2008) 71(6) MLR 853.

⁸³ Halsbury's Laws of England, (4th ed. 1974), VI, para. 1027; *Madzimbamuto v. Lardner-Burke* [1969] 1 A.C. 645, esp. at 723.

⁸⁴ For discussion of the issue of Sewel in *Miller*, see Jo Murkens, 'Mixed Messages in Bottles: the European Union, devolution, and the future of the constitution' (2017) 80(4) MLR 685, 690–94.

⁸⁵ Gordon, note 27 above, at 337.

⁸⁶ Others have suggested that a separate convention might be needed to govern *when* referendums should be called: see e.g. P. Leyland, 'Referendums, Popular Sovereignty and the Territorial Constitution' in Richard Rawlings, Peter Leyland, and Alison Young (eds), *Sovereignty and the Law: Domestic, European and International Perspectives* (Oxford: OUP, 2014) 145.

⁸⁷ Such a convention would of course be moot where the enabling legislation itself specified its legal consequences, as with the AV Referendum in 2011.

recalled, requires first, the existence of 'precedents'; second that the actors in the precedents believed that they were 'bound by a rule', and third, the need for a good 'reason for the rule'.⁸⁸ Plainly there are numerous precedents: in every referendum held in the UK in the post-war period, the result has been respected.⁸⁹ The *reason* for such a rule would be obvious: that the whole purpose of holding a referendum in the first place is to obtain a direct democratic mandate for a constitutional change so important that it is felt that mere legislation will not suffice.⁹⁰ Having held a referendum, it would then be unconscionable, as well as undemocratic,⁹¹ not to implement its results:⁹² doing so would likely also provoke a major political crisis. The argument that the political actors involved in the above precedents considered themselves to be 'bound by a rule' is harder to make out and would require detailed consideration. For now, it may be observed only that it is plain that all political actors in the recent referendums *did* regard themselves as bound to abide by the result. This was made particularly clear in the aftermath of the EU referendum. It is well known that there was a strong majority of MPs in the Commons for 'Remain'; however the voting record makes clear that nearly all MPs plainly regarded themselves as bound to implement the result of the referendum, even where they passionately disagreed with it.⁹³ They thus appeared to recognise a powerful norm binding on them.

It is suggested therefore that there is now a *prima facie* case for the recognition of a convention that Parliament and Government should generally abide by the results of any

⁸⁸ Sir Ivor Jennings, *The Law and the Constitution*, (5th ed, 1959), at 136.

⁸⁹ Examples include: the 1973 referendum on continued membership of the then EEC, the devolution referendums in Northern Ireland (1998) Scotland (1997) and Wales (1997 and 2011); the Alternative Vote Referendum (2011) re a possible change in the electoral system for General Elections; the Scottish Independence Referendum (2014) and the EU Referendum itself in 2016.

⁹⁰ See V Bogdanor, 'Brexit, the Constitution and the Alternatives' (2016) 27(3) *King's Law Journal* 314.

⁹¹ See Wingfield, note 72 above, at 347.

⁹² There might be the need for exceptions to develop over time to cover e.g. a major change of circumstances, or findings of significant irregularity in the conduct of the referendum.

⁹³ The December 2016 Motion approving the triggering of Article 50 discussed above was passed by 448 votes to 75; the European Union (Notification of Withdrawal) Act 2017 passed its Second Reading in the Commons by 498 to 114 votes. MPs who voted against either made clear that they were doing so not because they were seeking to frustrate the result of the referendum, but rather because they did not believe the Government had set out satisfactory plans for the UK's 'divorce agreement' with the EU (particularly re the position of EU citizens living in the UK) or its future relationship with the block. Only a tiny handful, including the veteran Conservative Europhile, Ken Clarke, made clear that they would vote to block implementation of the referendum result, if possible.

official referendum. Such a convention would serve to bridge the gap *Miller* exposed between the legal and the popular view of the EU referendum.

E. Conclusion on the broad-brush democratic arguments

The above has sought to demonstrate that while there were arguments used about *Miller* that had a political-constitutionalist cast, closer analysis reveals that they could not bite on the central issue in the case. But a second related point is perhaps more important: those arguing for the Government side of the case did not in the end rely on arguments stemming from either the referendum or Parliament's ability to control the Executive. As the next section will show, the crucial arguments deployed by the Government and its academic supporters when the case went to the Supreme Court concerned the construction of the ECA; and they logically entailed that the Government would have been legally free to withdraw from the EU at any time, *regardless* of the referendum.⁹⁴ They did not need even to assert that Parliament would repeal the ECA at the appropriate time: for under the arguments advanced, that statute would simply become 'spent' upon withdrawal. It would not be necessary to repeal it, precisely because it would become inert, in no longer having relevant EU law to bite on. That is one reason why I changed my own view of *Miller*: had there been a way of arguing it that directly tied the Government's freedom to use the prerogative to the referendum result, that might have rendered use of the prerogative acceptable in those particular circumstances. But as the next section will show, the key doctrinal arguments used in the end had nothing to do with the referendum.

IV. DOCTRINAL ARGUMENT I: LIMIT THE CASE TO *DE KEYSER'S*

In his elegant analysis of the competing syllogisms advanced in the *Miller* case, Aroney notes how each side tried to frame the case as centring on a different legal principle.⁹⁵ As we have seen, the claimants argued that triggering Article 50 would lead

⁹⁴ The only possible hindrance would have been the possibility of a judicial review challenging the *rationality* of a decision to withdraw: given the standard view that decisions taken under the foreign affairs prerogative are non-justiciable in this respect (see note 17 above), this possibility must be counted a remote one.

⁹⁵ N. Aroney, '*R (Miller) v Secretary of State for Exiting the European Union: Three Competing Syllogisms*' (2017) 80(4) MLR 685.

inevitably to the destruction of at least some EU-law rights given effect in domestic law by statute, thus changing domestic law, contrary to the general principle enunciated in *Rayner*.⁹⁶ In contrast, the Government sought to frame the case as resting on the application of the *De Keyser's* principle: that the foreign affairs prerogative empowered the Government to withdraw from the EU, *unless* legislation had actively abrogated that power, expressly or impliedly.

The reason why the Government was so keen to persuade the court that *De Keyser's* was the governing principle is clear. Had it been accepted that the applicable principle was 'the prerogative to withdraw subsists unless Parliament can be shown to have deliberately abrogated it', then the Government would have won.⁹⁷ It had only to point to the fact that there was no provision in any statute purporting to restrict – or even deal with – the decision to trigger Article 50,⁹⁸ an omission made more striking by the fact that Parliament *had* put restrictions – including, by 2011, 'referendum locks'⁹⁹ – on a long list of *other* things that the Government might vote for or do in the EU.¹⁰⁰

The significance of this point for present purposes is this: had the Government been right that *De Keyser's* was the relevant principle, then there *was* a possible political constitutionalist argument here. Finnis put it well by saying that the claimants were essentially trying to use the *courts* to impose a limit upon the use of Article 50 that Parliament had carefully refrained from imposing.¹⁰¹ Viewed that way, the case *could* be seen as illegitimately advancing judicial power over statute: the claimants were seeking to get the courts to, in effect, add a restriction upon the government that the relevant legislation had never contained.

⁹⁶ Above, note 12.

⁹⁷ This is especially so given that courts have often suggested that Parliament needs to make its intention very clear in order thus to specifically abrogate an existing prerogative: see e.g. *R v Secretary of State for Foreign and Commonwealth Affairs, ex p Rees-Mogg* [1994] QB 552.

⁹⁸ This included in particular the European Union Amendment Act 2008, which added the Lisbon Treaty, including Article 50, to the list of treaties to which the ECA gives effect.

⁹⁹ By virtue of sections 2, 3 and 6 of the European Union Act 2011.

¹⁰⁰ A point also made by Gordon, note 27 above, at 338.

¹⁰¹ 'J. Finnis, 'Brexit and the Balance of Our Constitution' (Policy Exchange Website, 2016), available <https://policyexchange.org.uk/judicial-power-project-john-finnis-on-brexit-and-the-balance-of-our-constitution/> at 24).

The trouble with this argument is simply that *De Keyser's* was not the relevant principle. The claimants had never argued that Parliament had ousted the prerogative to withdraw from the EU by specific provision in the ECA or elsewhere.¹⁰² Plainly it had not. Their argument was *not* that any particular provision in legislation had replaced or excluded the prerogative. It was that the *general principle* of law set out in *Rayner* - that the prerogative cannot be used to remove rights, change domestic law or frustrate the intention of any statute - precluded use of the prerogative in these circumstances. Despite its best efforts to steer the case away from the *Rayner* principle and onto the safer territory of *De Keyser's*, the Government's lawyers had to confront this argument in the end. And this is where, drawing heavily on commentary by Mark Elliott and John Finnis, they came up with their most clever and subtle counter-argument: that of *conditionality and contingency*.

V. DOCTRINAL ARGUMENT II: EU LAW RIGHTS AS CONDITIONAL AND CONTINGENT

As Elliott puts it: 'The axiom that the prerogative cannot be used to change domestic law does not bite directly upon EU law if it is not, in the first place, domestic law.'¹⁰³ The core argument here was that the design of the ECA meant that it never guaranteed any particular set of EU-law rights at all, but only such rights as were, 'from time to time', available under EU law, as it applied to the UK. Hence EU law was said not to be domestic law or to give rise to domestic law rights because the statute giving effect to it, the ECA, was 'ambulatory': it did not itself enact the rights but acted as a mere 'conduit' for the conveyance into domestic law of what remained a distinct body of treaty-based law. As such, the application of this body of law in the UK remained *conditional* upon the UK's continued membership of the EU – and hence *contingent* on the continuing decision of the Executive not to use its prerogative powers to terminate that membership. Since the EU-law rights were only ever intended to have effect during the UK's membership, withdrawal would neither frustrate the intention of Parliament nor remove 'domestic rights'. Whether this argument was correct as a matter of statutory interpretation is an issue considered at

¹⁰² The extraordinarily influential blogpost setting out what became the core of the claimant's case, by Nick Barber, Jeff King and Tom Hickman (the latter subsequently instructed as junior counsel for Gina Miller) did not rely on the *De Keyser's* principle: 'Pulling the Article 50 "Trigger": Parliament's Indispensable Role', U.K. Const. L. Blog (27th June 2016).

¹⁰³ Elliott, note 44 at 271.

length elsewhere.¹⁰⁴ The point for present purposes is not whether the argument is right or wrong; it is undoubtedly a cogent one that attracted considerable distinguished academic support as well as three of the eleven Supreme Court Justices.¹⁰⁵ Rather the question is how the argument looks viewed through the lens of political constitutionalism.

In one important sense, the argument is *neutral* as between legal and political constitutionalism. It is a technical doctrinal argument, revolving around contested interpretations of Parliament's intention and, in particular, rather conceptual propositions about the nature of EU law as it takes effect in domestic law. This was not a case like *Evans*,¹⁰⁶ in which one side was seeking to apply legislation as drafted, and another was seeking drastically to 'read it down' by reference to common law constitutional principles. The claimants, rather, were arguing simply that since it was Parliament that had given effect to EU law in domestic law by statute, it must be Parliament that authorised the removal of that effect.

If anything, the Government argument could be seen as inviting the judges to assume a power to decide that there is, in effect, a second-class category of statutes and of statutory rights: those that, unlike, normal statutory rights, count as subordinate to the prerogative. This is not the case in a *formal* sense, but it is in the practical and vital sense that the *effect* of this argument is to render the rights to which those statutes give effect removable by the Executive, using the prerogative - unlike other statutory rights.¹⁰⁷ Such statutes are in *one* sense subordinate to the prerogative: they can be rendered 'otiose', or 'spent' through Executive action; hence the rights given effect by such statutes exist only precariously, subject to Executive grace. As Emerton and Crawford put it, under this conception EU-law entitlements are not rights 'firmly rooted in the law of the land' but

¹⁰⁴ For critical analysis see Phillipson, note 26 above; Paul Craig, 'Miller, Structural Constitutional Review and the Limits of Prerogative Power' [2017] *Public Law* (Brexit Special Issue 2017) 48 and, in the same volume, Robert Craig, 'A simple application of the frustration principle: prerogative, statute and Miller' [2017] *Public Law* (Brexit Special Issue 2017) 25; Tom Poole, 'Devotion to Legalism: On the Brexit Case' (2017) 80(4) MLR 696.

¹⁰⁵ Lord Reed, Lord Hughes and Lord Carnwarth.

¹⁰⁶ *R (Evans) v Attorney General* [2015] UKSC 21.

¹⁰⁷ Finnis's attempt to suggest that there was a clear existing analogy with Double Taxation Treaties was subject to comprehensive critique showing the contrary: see esp. K Beal, 'The Taxing Issues Arising in Miller' U.K. Const. L. Blog (14 Nov 2016); J King and N Barber, 'In Defence of Miller', U.K. Const. L. Blog (22 Nov 2016). I have argued that his attempted analogy with extradition legislation is also unpersuasive: note 26 above, at 12-13.

rather ‘transitory privileges that come and go, depending upon how the executive decides to conduct its international relations’.¹⁰⁸ Given the hostility that some political constitutionalists have expressed towards the prerogative powers as lacking a democratic pedigree, compared to statute, one might have expected that in thus elevating Executive prerogative power over the continuing effect of these statutes, this argument might have made some political constitutionalists at least a little uneasy.¹⁰⁹

Of course its proponents would reply that they are *not* elevating prerogative over statute at all: their argument is precisely that Parliament *intended* to give effect to EU-law rights in a way that left them contingent upon a continued Executive decision to adhere to the EU treaties. But that argument in turn meets two difficulties. First, while there *is* a textual foundation for it in the particular ‘ambulatory’ design of the ECA, there is no direct textual evidence for it in the very different European Parliamentary Elections Act 2002 – which sets out in the body of the statute specific rights to stand and vote for elections to the European Parliament. Hence in making the argument that this statute should also be read as granting only rights ‘conditional’ on the prerogative, proponents ‘read in’ that contingency. Here therefore, the claimants were relying on a more literal, textual reading of an Act of Parliament; their opponents on a parliamentary intention, constructed without any direct textual support from the statutory language.¹¹⁰

The second difficulty with the argument is that it requires a court to reconcile this *de facto inferior* status of the ECA with the fact that Parliament had famously given that statute an *elevated* status above that of ordinary Acts of Parliament: elevated in that it could—and did—override and displace even the provisions of future Acts of Parliament as the well-known *Factortame* litigation demonstrated. The result of *Factortame (No 2)*¹¹¹—the disapplication of the later Merchant Shipping Act 1988 by the earlier ECA—was so remarkable that it led Sir William Wade to describe the outcome of the case as a technical

¹⁰⁸ Above, note 77, at 340.

¹⁰⁹ It did make one commentator uneasy: Keith Ewing refers to the Government’s key argument on conditionality as a ‘rather unattractive back door argument’ ‘rightly rejected by the majority’: above, note 8.

¹¹⁰ Hence I refer to this as the ‘non-textual argument’ and discuss it, note 26 above, at 18-21.

¹¹¹ *R v Secretary of State for Transport, ex parte Factortame Ltd (No 2)* [1991] 1 A.C. 603, applying s.2(4) ECA

‘revolution’.¹¹² While this was doubtless an exaggeration, the rulings of the then House of Lords in *Factortame (No 1)*¹¹³ and *Factortame (No 2)* showed beyond doubt that the ECA, and the EU law it gives effect to, have an elevated constitutional status in UK law—and one that was bestowed by Parliament itself. Thus not only were the Government and its academic supporters arguing for (in effect) a second-class category of statutes but were doing so in the face of Parliament’s clear intention to endow the most important of these statutes with an elevated status that was unprecedented.¹¹⁴

This feeds into the overall conclusion on the ‘conditionality’ argument. It may be described as ‘neutral’ as between legal and political constitutionalism because both it, and the rival claimant case, are genuine attempts to interpret and apply the intention of Parliament as expressed in the relevant legislation. But put together three factors: its elevation of prerogative power over the continuing effect of particular statutes; its ‘read-in’ of conditionality into the European Parliamentary Elections Act 2002; and the incongruity of asserting that an exercise of the prerogative may lawfully negate the effect of a statute that Parliament had regarded as so important that it had protected it – unprecedentedly – from implied repeal. Seen in this light, the argument begins to look concerned more with preserving *Executive* power than Parliament’s intent.

This takes us nicely to our final point – concerning ‘constitutional statutes’.

VI. MILLER: PUTTING THE ‘CONSTITUTIONAL’ STATUS OF STATUTES BACK IN THE HANDS OF PARLIAMENT

Both the Divisional Court and the Supreme Court were strongly influenced by the last point just made. Given that Parliament had afforded the ECA an elevated constitutional status above that of ordinary legislation such that it could override and displace even the provisions of *future* Acts of Parliament, they reasoned that it was most unlikely it had intended that the prerogative — a source of legal authority that ranks below Acts of Parliament—could be used to render the ECA a dead letter.¹¹⁵ Thus for both *Miller* courts,

¹¹² Sir William Wade, ‘Sovereignty—Revolution or Evolution’ (1996) 112 LQR 568.

¹¹³ [1990] 2 AC 85.

¹¹⁴ As both *Miller* decisions noted: see below.

¹¹⁵ The Divisional Court put it as follows: ‘Since in enacting the ECA as a statute of major constitutional importance, Parliament has indicated it should be exempt from casual, implied repeal by Parliament itself, still less can it be thought to be likely that Parliament nonetheless intended that

Parliament's intention to bestow a heightened constitutional and legal status on the ECA was a crucially important factor. In response, critics have complained that it is wrong to claim that *Parliament* can give an Act 'constitutional status' that sets aside the doctrine of implied repeal. This is said to be erroneous because contrary to certain well-known *obiter dicta* of Laws J (as he then was) in *Thoburn v Sunderland City Council*,¹¹⁶ *only the common law* may bestow such status. In that case, the judge observed that Parliament:

cannot stipulate as to the manner and form of any subsequent legislation. It cannot stipulate against implied repeal any more than it can stipulate against express repeal...The British Parliament has not the authority to authorise any such thing. Being sovereign, it cannot abandon its sovereignty.¹¹⁷

Commentary written by David Feldman¹¹⁸ and Mark Elliott and Hayley Hooper¹¹⁹ therefore argued that the Divisional Court had 'mis-state[d] the process by which a statute comes to be regarded as 'constitutional'; the Government's case on appeal to the Supreme Court picked up and repeated that criticism.¹²⁰

I have set out elsewhere my detailed argument that *Thoburn* was clearly wrong in asserting that *only* the courts, and *not* Parliament, can denote a given statute as having 'constitutional' status, and so being immune from ordinary implied repeal.¹²¹ It is necessary for present purposes only to observe that this assertion is impossible to square with both the plain words of section 2(4) of the ECA¹²² and the effect given to them by a unanimous

its legal effects could be removed by the Crown through the use of its prerogative powers' (above, note 49, at [88]). Similarly, the Supreme Court commented that 'Ministers acting alone cannot cut off the source of EU law from the UK' because: 'the source in question was brought into existence by Parliament through primary legislation [the ECA], *which gave that source an overriding supremacy* in the hierarchy of domestic law sources' (*Miller* at [81], emphasis added).

¹¹⁶ [2002] EWHC 195 (Admin); [2003] Q.B. 151.

¹¹⁷ *Ibid* at [59].

¹¹⁸ D Feldman, 'Brexit, the Royal Prerogative, and Parliamentary Sovereignty' UK Const. L. Blog (8 Nov 2016).

¹¹⁹ 'Critical reflections on the High Court's judgment in *R (Miller) v Secretary of State for Exiting the European Union*' U.K. Const. L. Blog (7 Nov 2016).

¹²⁰ Above, note 29 (Appendix, para. 2).

¹²¹ Phillipson, above note 26, 44-48.

¹²² Section 2(4), by saying that any Act 'to be passed', that is, any *future* Act, must take effect 'subject to' the provisions of the 1972 Act that made EU law effective in UK law, suggest that the courts must

House of Lords in *Factortame Ltd v Secretary of State (No 2)*,¹²³ which held that the requirement to 'disapply' the later Merchant Shipping Act 1988 came directly from Parliament's enacted intention, as expressed in s 2(4) of that Act. As Lord Bridge explained in *Factortame (no 1)*, that provision:

has precisely the same effect as if a section were incorporated in Part II of the Merchant Shipping Act of 1988 which in terms enacted that the provisions with respect to registration of British fishing vessels were to be without prejudice to the directly enforceable [EU law] rights of nationals of any Member State of the [EU].¹²⁴

For current purposes however, the key question is *not* which viewpoint is right as a matter of doctrine, but rather which elevates judicial power and which parliamentary power? The answer is obvious. The *Thoburn* approach privileges the role of courts: *only* the common law can elevate the status of a statute; Parliament is declared *unable* to do so. In contrast, the view of the court in *Miller* is that Parliament *itself* can decide to give one of its statutes a special constitutional status – and did so with the 1972 Act.¹²⁵ Hence it is the courts in *Miller* that thus elevated *parliamentary* power in this area and its critics who would have continued to elevate *judicial* power. In this regard *Miller* plainly dealt a modest blow to common law constitutionalism by putting legislative intent firmly centre stage. Regardless of whether one regards that as doctrinally correct, it is clearly a modest step away from legal constitutionalism *towards* political constitutionalism.

VII. CONCLUSION

allow EU law to prevail over subsequent Acts of Parliament, thus suspending the normal doctrine of implied repeal.

¹²³ [1991] 1 AC 603.

¹²⁴ [1990] 2 AC 85.

¹²⁵ To be clear, I do not suggest this means that the courts are *unable* to bestow constitutional status, on a statute, merely that Parliament can too.

Ekins, in his critical commentary on *Miller*, quotes Lord Reed's warning in that case with approval: 'It is important for courts to understand that the legalisation of political issues is not always constitutionally appropriate, and may be fraught with risk, not least for the judiciary'.¹²⁶ The concern of this article has not been to argue that *Miller* was correctly decided, but instead strongly to contest the notion that it amounted to the 'legalisation of political issues'. It has argued that, given the case was concerned only with the extent and applicability of an admitted prerogative, and not the propriety of its exercise, the principle applied by the court was one that is both core to the rule of law and a means of enforcing parliament's sovereignty: ultra vires. It has sought to demonstrate that the broader-brush democratic arguments that, for good reason drew political constitutionalist to the government's side, could not in the end affect this basic legal point. Finally, it has been argued that in at least one clear respect – its treatment of the ECA as a 'constitutional statute' – *Miller* amounts to a modest turn away from legal towards political constitutionalism. The conclusion is therefore clear: there was no good reason why political constitutionalists should have supported the Government side in *Miller*.

¹²⁶ *Miller* at [240]; quoted by Ekins, above note 41 at 353.